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Supreme Court of the United States

No. 959

DAVID RAY CROWLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The defendant, David Ray Crowley, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

David Ray Crowley was indicted in the United States District Court for the Eastern District of Virginia at Richmond, Virginia, during the October 1967 term for the violation of Title 50, U.S.C.A., Sections 456(j) and 462(a). The trial of the defendant commenced on December 4, 1967, before the Honorable Robert R. Merhige, Jr., Judge, without intervention of a jury. The defendant pleaded not guilty and after the matter had been continued several

times during the course of the trial was concluded on March 15, 1968, at which time the defendant was found guilty and sentenced to a term of four and one-half years. From the judgment of conviction, the petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 19, 1968, upholding the decision of the United States District Court for the Eastern District of Virginia. Said opinion is appended hereto (App. 5).

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

I. Whether petitioner was denied due process of law in that the order to report for civilian work upon which the indictment of petitioner was based is void because it was signed by a clerk of the local board?

II. Whether petitioner was denied due process of law in that the order to report for civilian employment failed to comply with 32 C.F.R., Section 1660.20(d)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

32 C.F.R., Section 1660.20(d) (1967):

If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon the type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

50 United States Code Annotated Section App. 456(j):

Nothing contained in this title (sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, (sections 451-454 and 455-471 of this Appendix), be assigned to noncombatant service as

defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) (section 454(b) of this Appendix) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title (section 462 of this Appendix), to have knowingly failed or neglected to perform a duty required of him under this title (sections 451-454 and 455-471 of this Appendix).

STATEMENT

David Ray Crowley is a registrant of Local Board No. 115, Spotsylvania County, Virginia. Defendant filed his classification questionnaire with the draft board indicating his claim to a ministerial exemption. This claim was corroborated by letters from other members of his religious organization. Pursuant to this the local board considered his classification on October 5, 1966, and classified him in I-0, which is the classification for a registrant who is opposed to both combatant and noncombatant service, and who would, with the I-0 classification serve in a civilian capacity. Defendant did not appeal this classification at that time, nor did he request a personal appearance with the board. On October 25, 1966, registrant was ordered to take his armed forces physical examination. He was found to be acceptable, and thereafter, the local board processed him for assignment to civilian work. In December of 1966, the draft board mailed the defendant a letter with a form attached

to be filled out regarding his preference to civilian assignment in lieu of induction. The defendant returned this without making any entries thereon, along with the letter saying he could not accept a job from the government. Again in March of 1967, the defendant was furnished with a list of three jobs, one of which he could accept that would be appropriate. Again, the defendant refused work. Thereupon, on April 21, 1967, the local board decided that registrant should be offered employment with the Virginia Department of Highways in Ashland, Virginia. The local board then wrote the State Director's Office for authorization from National Headquarters for the local board to order the registrant to report for civilian work. National Headquarters authorized the local board, and on May 19, 1967, an order to reoprt for civilian work was mailed to David Ray Crowley, said order being signed by a clerk of the local board. The defendant did not report as ordered and was subsequently indicted, tried and convicted.

ARGUMENT

I

Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Work Upon Which The Indictment Of Petitioner Was Based Is Void, Because It Was Signed By A Clerk Of The Local Board.

The determination at this point must be considered in light of the recent decision of *Brede* v. *United States,* 396 F.2d. 155 (9 Cir. 1968). This case involved a similar point of law in that the registrant, after being found to be otherwise acceptable, was classified I-0 and processing towards a civilian work assignment in lieu of induction was commenced, pursuant to 32 C.F.R., Section 1660.20. As in the instant case, a meeting was held between registrant and the

board as to the type of work in lieu of induction and no agreement was reached between the parties. The board did determine that work as an institutional helper was appropriate for registrant and that such work was available. Thereafter, the clerk of the draft board requested the Director of Selective Service for authority to order appellant to perform the work. Subsequent to such authority being received, an order to report for civilian work (Selective Service Form No. 153) was sent to registrant by a person who signed as clerk of the board. In reversing the conviction of the lower court, the Ninth Circuit held:

> It clearly appears from the record and we conclude that there was not an order issued or authorized by the board requiring the appellant to report to the local board for instructions to proceed to a place of employment. The local board did not comply with section 1660.20(d), supra, after receiving the authority to order the appellant to report for civilian work. This section requires the local board, after receiving such authorization, to meet and order the appellant to report for such civilian work. The appellant's Selective Service file shows that no meeting was held concerning the appellant subsequent to March 14, 1966. Neither the official clerk nor Barbara Jones, the person who signed the purported order, had or was given the authority by the board to order the appellant to report for civilian work in lieu of induction. It is not provided in the Selective Service Regulations that a clerk can order a I-0 registrant to report for civilian work without a meeting and the approval of the board members. In this case the board had not met after March 14, 1966, and had not given the clerk of the board, or anyone else, the authority to issue an order.
>
> This is not a case of a procedural error wherein there was no prejudice to the appellant. Here there was a failure on the part of the local board to issue or author-

> ize the issuance of an order to report for civilian work in lieu of induction. Obviously the purported order signed by Barbara Jones was not an order of the board or one authorized by it. There was no substantial compliance with section 1660.20(d), supra.

The footnote numbered 2 to the *Brede* decision reads as follows:

> [2] The April 22nd order was signed by Barbara Jones as clerk of the local board. At said time Barbara Jones was working for the local board she was not the clerk of the board and did not become clerk until September 19, 1966. We do not consider the effect, if any, of her signing the purported order because of our holding that no order was issued or authorized to be issued by the board.

Petitioner with respect to this particular point of law acknowledges the fact that the *Brede* decision did not rule on the effect, if any, of the order to report for civilian work being signed by a clerk of the board as opposed to a member of the board. As pointed out in the court below herein, Regulation 32 C.F.R. Section 1604.59 provides that "official papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted and entered in the minutes of the local board." In the case at Bar the order to report for civilian work was signed by a clerk for the local board. The Selective Service file contained no resolution adopted by the local board authorizing the clerk to enter said order. Pursuant to the request of the court below, the United States Attorney secured a statement from the clerk having signed the order in question, which was made a part of the record in this proceeding, which states as follows:

I have checked all Local Board # 115, Spotsylvania County, Va. minutes from 1948 to the present time and cannot locate a resolution in print that would give me authority to sign all official papers.

I have been clerk and executive secretary for Local Board # 115, Spotsylvania County, Va. and Local Board # 116, Fredericksburg City, Va. (in the same office) since August 1948. The resolution giving me authority to sign all official papers for Local Board No. 116 was recorded on minutes of March 2, 1960, and I feel very confident that this matter was brought before Local Board No. 115, Spotsylvania County, about the same time, and for some reason of oversight was not recorded on the minutes.

Very truly yours,

Virginia S. Nessenthaler, Exec. Sec.
LB # 115 & 116, Va.

This is a clear and unequivocal statement by the clerk signing the order in question that there was no duly adopted resolution entered in the minutes of the local board giving her authority to sign official papers of the board.

This matter was not decided by the *Brede* decision, but merely pointed out by the court as an issue. Petitioner is unable to find any case directly in point thereon. The lower court hinged its rejection of this argument on the fact that that court had held previously that a presumption of regularity attaches to the official proceedings and acts and that all necessary prerequisites to the validity of an official action are presumed and to have been complied with and where the contrary is asserted it must be affirmatively shown. It is respectfully urged that this places an impossible burden on the defendant in a criminal proceeding. Certainly it must not be forgotten that this is a criminal case and that the

burden of proving the defendant guilty beyond all reasonable doubt at no time lessens or shifts to the defendant. How can the defendant go forward to prove that no authorization was ever given to the clerk when in fact none ever was. We have the Selective Service file of the defendant, which, by the testimony of the party introducing it into evidence, Major Corman, contains the full and complete record of all official actions of the board with respect to defendant. Furthermore, we have the statement in the record by the clerk, herself, that no resolution was ever recorded in the minutes of this particular board authorizing her to sign the official orders of the board. It is acknowledged that the draft boards have a tremendous amount of paper work and red tape with which to deal. Be that as it may, this can in no way alter or affect the requirement for procedural and substantive regularity in processing the defendant for induction. If in fact an order is sent out which was not authorized or signed by the issuing body, then how can such order ever be the basis for a criminal prosecution. It is submitted that said order is totally void *ab initio* and that the indictment thereon must fall. If, however, this court should feel that the signature by the clerk to the order is directory rather than mandatory. it is urged that argument on this point be considered with that of the subsequent point argued here below.

II

Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Employment Failed To Comply With The 32 C.F.R., Section 1660.20(d).

Petitioner's argument specifically is that the board which determined his assignment to civilian work and submitted its action to the Director of Selective Service for his approval should thereafter have held another meeting to consider

his case again prior to the issuance of an order to report for civilian employment. On this basis also it is contended that the issuance of an order to report was never properly authorized and that it necessitates reversal of the conviction.

Unquestionably, the regulation makes approval of the director essential to a board's ordering a conscientious objector to report for civilian work. Further, the regulation requires that the director's approval be obtained before the local board may authorize issuance of the order. The lower court in this case held that an order to report for civilian work may be authorized conditionally, to become effective on the director's approval. In the *Brede* case, *supra,* the court modified its opinion, said subsequent opinion having been filed September 10, 1968, a copy of which is made a part of the record herein:

> The United States contends that under Universal Administration Construction of Section 1660.20(d) and Universal Administrative Practice, a determination that certain work is appropriate constitutes an implied order to report for such work, subject to authorization of the National Director and notice.
>
> Consequently, at the meeting of March 14, 1966, an agreement as to work was reached and an implied conditional order to report was entered and the action of the clerk of the board was no more than an implementation of the order.
>
> The Government's contention may have merit in an appropriate case. Here, however, the record is silent as to administrative construction and practice or as to any understanding of the board in such respects from which it might be found that the critical exercise of administrative judgment had been made.

It is submitted that as in the *Brede* case the record in this proceeding is likewise silent as to administrative construction

and practice or as to any understanding of the board from which it might be found that the critical exercise of administrative judgment had been made. The record in the instant case very closely parallels that of the *Brede* decision, and it is submitted that this court should rule in accordance with the *Brede* decision that the order to report for civilian employment was never officially entered.

CONCLUSION

For the reasons stated it is hereby respectfully submitted that a Writ of Certiorari be issued to review judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

DAVID RAY CROWLEY

By ROBERT G. CABELL, JR.
Counsel

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721 East Main Street
Richmond, Virginia 23219
Counsel for Petitioner

CERTIFICATE

I hereby certify that a true and complete copy of the foregoing Petition for a Writ of Certiorari was mailed to the United States Attorney, Eastern District of Virginia, Post Office Building, Richmond, Virginia, and to the Solicitor General of the United States, Department of Justice, Washington, D.C., on the 20th day of January, 1969.

ROBERT G. CABELL, JR.

STATE OF VIRGINIA,
CITY OF RICHMOND, } to-wit:

This day personally appeared ROBERT G. CABELL, JR., before me, a Notary Public in and for the City and State aforesaid, and after being duly sworn made oath that the statements set forth in the foregoing Certificate are true.

Given under my hand this 14th day of January, 1969.

My commission expires: 2/13/72

/s/ BEVERLEY B. SALMON
Notary Public